RECEIVED
MAY 31 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 73-5993

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

ORIGINAL COPY

JOHN E. TEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5993

JOHN E. TEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of the knowing and intentional distribution of lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 841(a)(1). He was sentenced to eighteen months' imprisonment (Pet. 3). The court of appeals affirmed on November 1, 1973 (Pet. App. B). The petition for rehearing was denied on November 26, 1973 (Pet. 2). The petition for a writ of certiorari was not filed until December 27, 1973,[1/] and is therefore out of time under Rule 22(2) of the Rules of this Court.

In October 1971 petitioner met one Peter Brophy at Brophy's fish market and became friendly with him (Tr. 77, Vol. I). Petitioner thereafter began doing odd jobs at the market. Brophy told petitioner that he had previously been involved in trafficking in drugs (which was not true) and asked petitioner to sell him some LSD for his friends. Petitioner sold Brophy seven LSD tablets, which Brophy turned over to agents of the Bureau of Narcotics and Dangerous Drugs (I Tr. 102, 103, 112, 113, 116).

In March 1972, Brophy introduced petitioner to Special Agent Allen of the BNDD (I Tr. 32, 40, 41, 107, 108). Agent Allen and petitioner met several times to discuss drug deals involving large amounts of cocaine, marihuana and mescaline (Tr. 32-34, 58, 91-92). On March 28, 1972, petitioner sold agent Allen 1,000 LSD tablets for $450 (I Tr. 16, 35, 36).

1. Petitioner contends that the trial court committed reversible error by refusing to answer two questions from the jury. The questions and answers were (emphasis in original):

> Q. #2 Can the terms LSD and mescaline be considered as interchangeable words as far as the jury is concerned in determining a verdict on the indictment.
>
> A. I regret the court cannot answer your question.
>
> Q. #5 Can Pete Brophy be considered _as working with_ Government as regards the "entrapment" law.
>
> A. You must rely on your memory of the court's instructions and the evidence.

With respect to the first of these questions, the trial court initially proposed to advise the jury that the terms were in fact not interchangeable, but that both LSD and mescaline were controlled substances (Tr. 50). Defense counsel objected to this [illegible] on the ground that the court [illegible]

[illegible]

[1/] Petition [illegible]

the indictment; he asked the court to instruct only that the terms were not interchangeable (Tr. 50). The trial court refused to respond to the jury in this manner, on the ground that such a response would be incomplete and misleading. Instead, the court told the jury that it could not answer the question.

Petitioner's proposed answer was based upon the theory that, if he had in fact distributed LSD while intending to distribute mescaline, he should be acquitted. Since both drugs are Schedule I controlled substances (21 U.S.C. 812(c), Schedule I(c)), and since the statute requires only the intent to distribute a controlled substance, this theory is incorrect and petitioner's proposed answer could have misled the jury. Of course, if the indictment had charged the unlawful distribution of LSD, and petitioner had in fact distributed mescaline, that would appear to be a good defense to that indictment. For that purpose the terms are not interchangeable. But petitioner did not challenge the laboratory test concluding that the substance he admittedly distributed was LSD.

The second question related to Brophy's status as a government informant. It presented an evidentiary question. The court, in its discretion, properly instructed the jury to rely on its reconstruction of the evidence and the instructions rather than giving an answer that would have unduly emphasized one aspect of the entrapment defense.

2. Petitioner's contention that a mistrial should [illegible]

United States Attorney in his closing argument is without merit. After the first comment,[2] the substance of which was a response to defense counsel's appeal for sympathy for a first offender, the court properly sustained petitioner's objection and gave the jury a cautionary instruction (Tr. 31, Sup. Vol. I). This was the correct procedure, and it sufficiently cured any confusion that the comment may have generated. See United States v. Esquer, 459 F.2d 431, 436 (C.A. 7); United States v. Burston, 453 F.2d 605, 611 (C.A. 5), certiorari denied, 409 U.S. 843; United States v. Haile, 443 F.2d 1295, 1300 (C.A. 9).

Petitioner made no objection to the second comment that he now challenges[3] (Tr. 33, Sup. Vol. I). Consequently, petitioner's [illegible] [illegible], if the comment amounted to plain error. Rule 52(b), Fed. R. Crim. P.; Harris v. United States, 402 F.2d 656, 657 (C.A. D.C.). Here, there was no plain error. A United States Attorney may comment on the credibility of a defendant who takes the stand. United States v. [illegible], 475 F.2d 312, 317 (C.A. 7). Moreover, even if the prosecutor's characterization of certain of petitioner's testimony as "lies" is deemed ill-considered commentary upon the defendant's credibility, such commentary here did not so prejudice petitioner as to deprive him of a fair trial. See United States v. Porter, 432 F.2d 548, 549 (C.A. 9), certiorari denied, 400 U.S. 928.

---

[2] "We're not arguing that he has never committed these crimes before. What Mr. Gerash is telling you is that he has never been caught before, so set him free on the first time he is caught. And, of course, he will argue that to the next jury, if there is another jury. Well, Mr. Test has never been caught before, so you should set him free again. Right. Because if nothing happens here, if he were not convicted here, it's as if he's never been caught before. Do we let the person, the murderer, kill one for free? Do we let the hijacker steal one airplane for nothing because --

MR. GERASH: Your Honor, we are not trying a murder or hijacking.

THE COURT: Yes, Mr. Gerash, your objection is well taken.

MR. WIGGINS: -- because a person --

THE COURT: Ladies and gentlemen, we are not trying either a murder case or a hijack case, or anything else here. We are trying the single charge in a one count indictment. (Tr. 31, Sup. Vol. I).

[3] "When he's already lied to you about claiming guilt to Mr. [illegible] with [illegible] All we ask [illegible] only lied to you [illegible] in his testimony, how can you believe him." (Tr. 33, Sup. Vol. I).

3. Following his indictment, petitioner filed a motion pursuant to 28 U.S.C. 1867 to dismiss the indictment because of the denial of a fair and impartial jury. He claimed exclusion of persons under age 35, persons with Spanish surnames, members of the Negro race and students, all in alleged violation of 28 U.S.C. 1861. Petitioner asked for an evidentiary hearing at which to prove this claim. Petitioner at the same time filed a motion seeking inspection and reproduction of the master jury wheel list and the qualified jury wheel list of the district court. Along with these motions, petitioner's counsel attached an affidavit in which he summarized the results of a hearing held in a state case involving a similar claim.

Although the petition refers to systematic exclusion of certain groups from [illegible] [illegible]

[illegible]

it relied exclusively on voter registration lists as the source of names of potential jurors. Petitioner does not allege that the voter lists were discriminatorily compiled; nor does he allege that a discriminatory selection process was used in choosing qualified jurors. Petitioner simply contends that the use of voter registration lists results in sufficient underrepresentation[4] of certain groups, primarily persons with Spanish surnames, to invalidate the jury selection plan.

Petitioner complied with the provisions of 28 U.S.C. 1867, which prescribes procedures for challenging a jury selection plan, by filing a timely motion, accompanied by a sworn statement. As noted earlier, petitioner also moved to inspect the jury lists, i.e., the master and qualified wheels. In denying petitioner's motions, the district court assumed that the use of voter lists resulted in some degree of underrepresentation of blacks and persons with Spanish surnames (Court of Appeals Record, Supp. Vol. II, pp. 13-14). The court, apparently believing that its concession of underrepresentation made inspection of the lists unnecessary, denied the motion to inspect with the following comment:

> "If you want to look at the jury list sometime, we will hire some extra help and you come down and you can look at it all you want to, but it's not going to be had in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname is not a pro rata percentage that these groups bear to the total population. We concede that." (Id. at 17).

---

[4] Underrepresentation refers to the disparity between the percentage of members of a cognizable class (e.g., blacks) on the jury list and the percentage of members of the class in the voting [illegible]

In our view, the district court erred in denying petitioner's motion to inspect the jury lists. 28 U.S.C. 1867(f) expressly provides that parties "shall be allowed to inspect, reproduce, and copy" such lists in the preparation or pendency of a motion challenging the jury selection plan. See, e.g., United States v. Beaty, 465 F.2d 1376 (C.A. 9); United States v. Tijerina, 446 F.2d 675, 681 n. 5 (C.A. 10); see also Hobley v. United States, [illegible] F.2d 760 (C.A. 5).

The effect of the district court's error for purposes of disposition by this Court must be determined by a consideration of the policies of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 et seq., with particular reference to Congress' intentions as to implementation of those policies. The Act reflects two fundamental policies concerning jury selection: Section 1861 declares that juries are to be "selected at random from a fair cross section of the community * * *," and Section 1862 declares that no citizen shall be excluded from jury service "* * * on account of race, color, religion, sex, national origin, or economic status."

Both the language and the legislative history of the Act demonstrate that Congress favored the use of voter lists as the source, and random selection as the means, of jury selection as most likely to achieve the "cross section of the community" goal. See 28 U.S.C. 1863; H. Rep. No. 1076, 90th Cong., 2d Sess., 1968 U.S. Code, Cong. & Adm. News, p. 1792. The implementation of the "cross section" goal of Section 1861 [illegible] policy [illegible]

[illegible]

affirmative obligations in certain cases beyond simply negating barriers of discrimination.

Opinions of the Courts of Appeals for the Ninth and Second Circuits have, however, suggested a more restrictive approach. Those courts have held, in effect, that voter lists are per se valid unless there is a showing that the groups alleged to be underrepresented were the subject of electoral discrimination within the district where the jury selection plan is at issue. See, e.g., United States v. Guzman, 468 F.2d 1245 (C.A. 2), certiorari denied, 410 U.S. 937; United States v. James, 453 F.2d 27 (C.A. 9); United States v. Bennett, 445 F.2d 638 (C.A. 9), certiorari denied, 404 U.S. 1023; United States v. Parker, 428 F.2d 488 (C.A. 9), certiorari denied, 400 U.S. 910.

The above decisions are based on the premise that a defendant must establish systematic exclusion of a cognizable class in order successfully to challenge a jury selection plan.[5] In effect, the Ninth and Second Circuits have adopted the standards of this Court's Sixth Amendment opinions (e.g., Whitus v. Georgia, 385 U.S. 545; Hernandez v. Texas, 347 U.S. 475) as controlling under the Jury Selection and Service Act of 1968. If this view is correct, then the failure to allow inspection of the lists was not a material error in the absence of an initial allegation or showing by petitioner of past or present voter lists used in Colorado, which he has not done. We believe, however, that the Act established rights broader in scope than those prevailing under Sixth Amendment principles, so that substantial underrepresentation of cognizable groups (which would include blacks and Mexican-Americans) may necessitate resort to supplementary sources under Section 1863 even though no history of voter discrimination against those groups is proved.

---

[5] This premise is explicit in the Ninth Circuit decisions, and, although not expressly referred to in United States v. Guzman, supra, it is a necessary underpinning of that decision. [illegible] that the decision in Guzman may be partly [illegible]

Our construction of the Act is derived from our view of the significance of the "cross sectional" goal of Section 1861. In short, we submit that when Congress required that juries be selected from a "cross section of the community," it intended that federal jury selection plans be affirmatively formulated to achieve that goal and not merely to avoid discriminatory practices.[6/] While Section 1863 provides for use of voter lists, it also contemplates resort to supplementary sources where necessary to foster the policies of Sections 1861 and 1862. Although in providing for supplemental sources of jurors Congress may have been most concerned with past practices of electoral discrimination, particularly in the South, the provision was not so limited. The House Report stated that voter lists are to be supplemented "* * * whenever they do not adequately reflect a cross section of the community." H. Rep. No. 1076, *supra*, at page 1791.

6/ This is not to say that patterns of discrimination are irrelevant in challenges [illegible] under the Act. For example, [illegible] proof of the existence of past or [illegible]

Since, on this record, it is not possible to know the degree of under-representation, if any, of various groups on Colorado's voting lists, and thus the possible deviation of Colorado federal juries from the community cross section, we believe that petitioner was entitled to inspect the jury lists. That is not to suggest, however, that he is likely to prevail in his challenge to the selection plan. While voter lists inevitably appear to involve some degree of underrepresentation of certain groups, they remain the best "cross-sectional list of non-racial character." Gewin, The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals, 20 Mercer L. Rev. 349, 351 (1969).

Whether voter lists operate as effectively in the area of racial elements depends in large part on whether there is any history of electoral discrimination and on the efficacy of remedial legislation such as the Voting Rights Act of 1965. Here, where it is not alleged that patterns of discrimination have existed in Colorado, petitioner must, in our view, demonstrate a greater degree of underrepresentation than would be required where there is evidence of patterns of discrimination. In any event, since a voter list cross-section is necessarily not a numerically perfect cross section, petitioner must make a showing of underrepresentation of a substantial magnitude.[7]

---

[7] Petitioner must, of course, show that the groups which are alleged to be excluded are cognizable classes for purposes of [illegible]

We note, for example, that in [illegible] v. [illegible], [illegible] F.2d 6[illegible] (C.A. 4), rehearing denied, [illegible] F.2d [illegible] (C.A. 4), certiorari denied, [illegible] U.S. [illegible], the court of appeals upheld a jury selection plan which used actual voter lists although such lists allegedly resulted in underrepresentation of blacks in the Western District of North Carolina by as much as 39 percent. This Court declined to review the decision, even though the underrepresentation occurred in a district where there was a history of electoral discrimination.[8]

If this Court agrees with the approach reflected in the decisions of the Ninth and Second Circuits, it should deny the petition for a writ of certiorari in this case, since petitioner has not alleged the existence of a past or present practice of electoral discrimination in the District of Colorado against the groups identified in his motion. Thus, any underrepresentation shown by inspection of the jury lists would not be attributable to systematic exclusion but simply to failure to exercise the franchise.

On the other hand, if this Court finds our construction of the Act persuasive, it would be appropriate to grant the petition for the limited purpose of remanding this case to the court of appeals with instructions that petitioner's motion challenging the array be considered by the district court, after petitioner has been afforded an opportunity to inspect the jury lists. See United States v. [illegible], supra.

---

[8] [illegible]

Since petitioner [illegible] in a [illegible] and he is entitled [illegible] a successful challenge to the jury plan, it is respectfully submitted that the petition should be denied in all other respects.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

BEST COPY AVAILABLE